IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MARYLAND

LEADERS OF A BEAUTIFUL STRUGGLE, et al.,
Plaintiff,
vs.
BALTIMORE POLICE DEPARTMENT, et al.,
Defendant.

CIVIL NO.: RDB-20-0929

Transcript of Proceedings
Before the Honorable Richard D. Bennett
Tuesday, April 21st, 2020
Baltimore, Maryland

For the Plaintiff:

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Brett M. Kaufman, Esquire
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For the Defendant:

Dana P. Moore, Acting City Solicitor
Elisabeth Walden, Assistant City Solicitor
Kara Lynch, Assistant City Solicitor

Also Present: Commissioner Michael Harrison

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P R O C E E D I N G S

THE COURT: Good morning. I apologize, I've been saying good morning for the last five minutes I was starting to get worried. I gather we're all on the line now. This is a telephonic hearing on the record in the matter of Leaders of a Beautiful Struggle, et al., versus the Baltimore Police Department, civil action No. RDB-20-0929.

Let me just go over the process here. We're all a little muted, doing the best we can do. We actually have a better system hooked up than we've, perhaps, had in a while. But let's make sure it's functioning properly here. I want to first of all thank my law clerk, Anthony Vitti and the clerk's office for arranging this from various locations. I, myself, am here at the Federal courthouse. This is Judge Richard Bennett. And also I want to thank Christine Asif, our administrative court reporter, our chief reporter who is on the line. Christine, you are on the line?

THE COURT REPORTER: I am. Can you hear me?

THE COURT: Yes, I can. Good morning to you and thank you, Christine.

THE COURT REPORTER: Good morning. Thank you.

THE COURT: There is a standing order, I believe it's now No. 2020-07, pursuant to which all civil and criminal petit jury selections and trials and nonemergency proceedings through June 5 have essentially been extended. But we're

conducting this conference call on an important matter remotely, which is on the record.

I would ask that, essentially, the process will be as follows: I'm going to have everyone introduce themselves in a moment. Let me just note that it will be very important for people to identify themselves when they speak.

And I would note that all callers here are bound by the same rules of our court that apply if we were sitting in the courtroom. Specifically, no recordings or broadcasting of the proceeding. This entire matter is being transcribed by Ms. Asif. And a transcript is available to anyone who would like it, but there is no recording of these proceedings.

I think in order to have things work smoothly it's going to be very important for everyone to mute their phone when they are not speaking. And then when they need to speak then unmute it and then introduce themselves and I think that should work fairly well here.

Let me just summarize the posture of this case and then we will hear -- we'll have counsel identify themselves. The -- on April the 9th, the plaintiff's leaders of a beautiful struggle Erricka Bridgeford and Kevin James, the plaintiffs, commenced this lawsuit against the Baltimore Police Department and Baltimore Police Commissioner Michael Harrison, alleging that the Aerial Investigation Research, acronym AIR Program, violates their rights under the First and

Fourth Amendment to the United States Constitution. And that same day, on April the 9th, a motion for a temporary restraining order and preliminary injunction were filed seeking to enjoin and prohibit the Baltimore Police Department from collecting or assessing any images through the AIR Program.

I promptly scheduled a telephone call with counsel the same day. And it was agreed that the following schedule would abide: That pending a decision of this Court on the motion for preliminary injunction, the Baltimore Police Department and its agents and its assigns would essentially agree that no flights to collect, obtain, or access any photographic imagery would take place until we were able to conduct this hearing. And then I scheduled a briefing conference. And this matter has now been fairly briefed and I thank counsel for their thorough briefing consistent with the schedule they set forth on April the 9th.

And we are now here conducting this preliminary injunction hearing here on the record. And I have, given that counsel have very carefully complied with my scheduling order, I can promise you that I will comply with my requirement. And that is that I promise I will issue a decision on this motion by this Friday, April the 24th, no later than 5:00 o'clock p.m.

So that is the procedural posture of this case. And

some of the ground rules that I think we should observe to make sure that this goes smoothly. And with that, if counsel would identify themselves for the record, first for the plaintiffs. If counsel would identify themselves for the record.

MS. GORSKI: Good morning, Your Honor. And may it please the Court, this is Ashley Gorski speaking with the ACLU, I'm joined by my colleagues Brett Kaufman, David Rocah, Alexia Ramirez, Nate Wessler and Ben Wizner. Today I'll be discussing standing issues, PI factors and First Amendment claim. And my colleague Mr. Kaufman will be discussing the Fourth Amendment claims.

THE COURT: Yes. Thank you very much, Ms. Gorski. And welcome to all of you.

And on behalf of the defendants, the Baltimore Police Department and Commissioner Michael Harrison.

MS. MOORE: Good morning, Your Honor. This is Dana Peterson Moore, I'm the Acting City Solicitor for the City of Baltimore, here on behalf of the Baltimore City Police Department and Commissioner Michael S. Harrison. Joined on the call today by Lisa Walden who's the chief of legal and legal counsel for the Baltimore Police Department and Kara Lynch. And I believe that Police Commissioner Harrison is also on this call.

THE COURT: All right. Good morning to all of you.

And with that, let me just suggest that what I think is being constructive is that I'll give each side just a few minutes, don't have to make it too lengthy, but five to seven minutes, if you so desire, to make an opening statement here with respect to the respective positions. And then my view is that we should first address the issue of standing in terms of the challenge by the defendant as to the standing of the plaintiffs with respect to the Fourth Amendment and First Amendment challenges.

So if that works for everyone, let me first hear from the plaintiffs for an opening statement. And then I'll hear from the defense. And then we will proceed with the matter of standing, starting first with the defendant's counsel in terms of the challenge to the standing of the plaintiffs in this matter.

MS. MOORE: Thank you, Your Honor. What the issue here is the most expansive mass surveillance program ever proposed in an American city. It will subject virtually all of Baltimore's 600,000 residents, including plaintiffs, to inescapable surveillance. The surveillance is not it is imminent. There is no question that plaintiffs have Article III standing to challenge the AIR Program on Fourth and First Amendment grounds.

Plaintiffs could also establish a likelihood of success on their Fourth and First Amendment claims on the

merits. I'm happy to speak of it more about standing or pause now.

THE COURT: No, let me hear next from the defense in terms of their opening statement. And then we will proceed with the defendant's position, being their motion response as to the standing issue. Opening statement for the defense.

MS. MOORE: Yes, Your Honor. Dana Moore again. Your Honor the AIR pilot program, which is an abbreviation for the Aerial Investigation Research Program is actually a pilot program. It presents a remarkable opportunity to test the efficacy of a constitutional surveillance tool that impinges not at all on the daily lives of Baltimoreans. It is not disruptive. It does not go into private lives. It is not invasive. It is constitutional. We believe, and will argue momentarily, that none of the three named plaintiffs have standing to pursue their claims against the city of Baltimore's Police Department and Michael S. Harrison.

The plaintiffs are familiar to us. We very much appreciate and respect their advocacy and the organizational efforts on behalf of bringing justice to Baltimore. We value their work. They are, indeed, part of the solution to Baltimore's rampant crime problem. But their approach as advocated in their papers is not the approach that the Baltimore City Police Department has decided to pursue. And their approach and their views cannot be permitted to supplant

what is clearly a constitutionally reasonable crime fighting initiative that in no way infringes upon any constitutionally protected right held by any of the plaintiffs.

At the root this lawsuit is driven by the plaintiff's own view of how the Baltimore Police Department should respond to the pandemic of violent crime in the city of Baltimore. We know this because they tell us this in their declaration. That is what this lawsuit is about. Certainly, Your Honor, the tactics that the Baltimore Police Department should use and what strategies it should pursue are policy decisions correctly and fully entrusted to the police commissioner, Michael S. Harrison. For these reasons the Court should reject the plaintiff's efforts to replace the commissioner's judgment with their own. Thank you.

THE COURT: Thank you very much. And with that I think I misspoke, I want to hear first from the plaintiff in terms of the standing issue and I apologize. Obviously, to establish Article III standing a plaintiff must show, one, an injury in fact; two, a demonstrated causal connection between defendant's actions and the alleged injury; and show that the -- third, that the injury will likely be redressed by a favorable outcome.

So that I'll be glad to hear, I think Ms. Gorski, you indicated that you were going to be presenting the argument for the plaintiffs on the standing issue. I'll be

glad to hear from you.

MS. GORSKI: Thank you, Your Honor, of the three elements of the Article III standing the Court just identified, the only issue in dispute here is injury in fact. And I'll begin by speaking briefly about standing for plaintiff's Fourth Amendment claim.

For this claim the plaintiffs have standing because the BPD, through PSS, will be collecting their sensitive location information. Case law is clear that plaintiffs have standing to allege Fourth Amendment injury from the government collection of records relating to them, regardless of whether those records are later searched. And under established precedents, PSS's collection is state action that is legally attributable to the BPD. The BPD has initiated the surveillance and it has directed PSS to undertake it pursuant to the contract. Defendants haven't disputed the close nexus between PSS and the BPD. They haven't disputed the fact that they've provided significant encouragement to PSS. And they have not disputed that PSS is exercising powers that are traditionally the exclusive prerogative of the state.

If the Court disagrees with plaintiff on whether the AIR Program ultimately violates a reasonable expectation of privacy, that would be a merits issue not an Article III standing one. We didn't cite this case in our briefing but the Supreme Court's decision in *Minnesota v. Carter* from 1998

explains that the definition of Fourth Amendment rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing. And the Second Circuit decision in *ACLU v. Clapper* is further support for this point. In that case the Court held that the collection of plaintiff's call records established standing for their Fourth Amendment claims without reaching the merits of that claim.

I'm happy to speak now about First Amendment standing if the Court would like or give time over to --

THE COURT: Yes, you can go as to -- I would just note, as I understand it, Ms. Gorski, and I'll hear from Ms. Moore or Ms. Walden or Ms. Lynch in a moment, but as I understand it the defendants have essentially taken the position that your clients don't have standing to challenge a possible future search. And they have argued, probably not the first time, certainly, talking about the Supreme Court's opinion in *United States versus Carpenter* decided in June of 2018, which obviously is a key case for us to be discussing here at 138 S.Ct. 2206. And the defendants have essentially argued that in the *Carpenter* case the Supreme Court did not hold that the cell phone carriers violated the Fourth Amendment, that it was the government access to that data that violated the Constitution. Essentially, as I understand it, the thrust of the position of, again, the defendants I'll hear

in a moment, is that until there is a access of the data that there has not been -- until there's nothing more than a possible future search. Do you want to respond to that before you move to the First Amendment?

MS. GORSKI: Yes, Your Honor. So I think there are two issues invited here. The first issue is the state action issue. And because PSS is acting at the BPD's direction, PSS's initial collection of plaintiff's information, before any search takes place, the collection itself, the aerial surveillance itself, is an injury sufficient for plaintiff's Fourth Amendment claims. And *ACLU v. Clapper* is very clear on this point.

The 4th Circuit's recent decision in the *Wikimedia* case is similarly support for this proposition. There the government argued that the NSA's collection of plaintiff's communication did not constitute a Fourth Amendment injury and that only the review of those communications subsequently would qualify as an injury. And the 4th Circuit was unpersuaded. It held the fact that the fact that the NSA is intercepting communications shows that there's an invasion of a legally protected interest and that suffices for standing purposes.

So one issue is the state action issue. And the second issue is the notion that there is no injury until an entity is reviewing or searching through these records. It is

clear that PSS is a state actor here and its actions are attributable to the BPD. And it's clear under the *Wikimedia* case, under *ACLU v. Clapper* that PSS's initial collection of this information constitutes a Fourth Amendment injury.

THE COURT: Thank you, Ms. Gorski. We'll move to the First Amendment next in just one second. Just for the record, for those members of the public or media that are listening in here, PSS is obviously referring to Persistent Surveillance Systems, which is the Ohio-based company which has contracted with the Baltimore Police Department; correct?

MS. GORSKI: Yes, Your Honor. And my apologies for just using the acronym.

THE COURT: That's okay. The Legal community consistently using acronyms. Always believe it's important to emphasize for the public so they understand, PSS henceforth for these matters here this morning, refers to Persistent Surveillance Systems, which is the Ohio-based company, which is to conduct the aerial surveillance that's at issue here.

So with that if you want to address the First Amendment standing issue as well, Ms. Gorski. And then I'll hear from counsel for the City and Police Department.

MS. GORSKI: Thank you, Your Honor. And one final note on the Fourth Amendment, you mentioned the defendant's argument with respect to the *Carpenter* case. And this case is very, very different from the *Carpenter* case. A cell phone

providers are not agents or instrumentalities of the government. Cell phone providers, when they collect individual cell site location information, are not doing so at the behest of the government. Here, in contrast, PSS is collecting this information at the behest, at the direction of the BPD. And that means that defendant's *Carpenter* analogy is entirely misplaced.

Moving on now to the First Amendment argument. I want to emphasize at the outset that defendants do not dispute the merits of plaintiff's First Amendment claims. The only First Amendment issue in dispute is the likelihood of plaintiff's standing. The plaintiffs here have established three distinct First Amendment injuries, each of which is sufficient to confer standing. The first injury is the AIR Program's collection of plaintiff's private associational information. This collection is itself an injury in fact. And here I want to underscore that the defendants do not dispute that plaintiffs' private information will be collected pursuant to the AIR Program. There's no question that plaintiffs' location information will be collected by PSS.

The second injury that plaintiff's have identified is the protective measures that they will be forced to take if the AIR Program is permitted to go forward. These include plaintiff, Ms. Bridgeford, changing her means of communication, which will impair her work. And plaintiff

Leaders of a Beautiful Struggle altering the timing and location of its meetings, which will divert staff resources from other work.

And the Supreme Court has been very clear that these kind of protective measures are cognizable injuries, so long as the challenged government action is not hypothetical. And here the AIR Program is not hypothetical. It is imminent. This case is entirely unlike *Clapper versus Amnesty International* in which the plaintiff's fear of surveillance is speculative. Here there is no question that plaintiffs will be subject to the AIR Program and defendants don't dispute that.

Under *Amnesty International*, under *Laidlaw*, under *Department of Commerce v. New York*, plaintiffs' protective measures are cognizable injury. Defendants argue that *Amnesty* forecloses the theory of injury based on protective measures, but *Amnesty*, in fact, acknowledges and affirms the line of cases holding that protective measures constitute cognizable injuries. Cases like *Monsanto* and *Laidlaw*. Again, the problem with Amnesty was that there the plaintiffs' protective measures were based on hypothetical future harm and that's just not the case here.

The third and final injury the plaintiffs have identified is that they and the people they associate with will be chilled. And on this point the defendants devote much

of their briefing to *Laird* and *Donohoe*. But the subjective chill in those cases is very distinguishable from the chill here. We've explained this in the briefing and I won't belabor it, but I do want to underscore two key points.

First, in *Laird* the plaintiffs there claimed they were chilled by the mere existence of an otherwise lawful surveillance program. They did not contest the legality of the underlying surveillance. Their only complaint was the chilling effect. And even then they cast considerable doubt on whether they, themselves, were chilled. Here in contrast, plaintiffs have argued that the AIR Program violates the Fourth Amendment. They have also explained that they are imminently subject to this program and that they have provided concrete, objective evidence of chill.

The second point that I want to emphasize is that in the *Wikimedia* case, the 4th Circuit recently held that a plaintiff's allegation that it was chilled by government surveillance established cognizable First Amendment injury. Defendants over read Laird, they suggest that Laird speaks so broadly that it essentially forecloses a chilling effect theory of injury in surveillance cases. But *Wikimedia* makes clear that where the surveillance is not hypothetical, chilling effects are a basis for standing.

THE COURT: Thank you, Ms. Gorski.

MS. GORSKI: Thank you.

THE COURT: Thank you very much. And before I hear from defense counsel, I would just note, so the record is clear, that pursuant to the complaint that was filed and the affidavit attached thereto on April 9th, just so I'm clear as a matter of the record, the plaintiff, Leaders of a Beautiful Struggle is a limited liability company founded in 2010, and according to the affidavit of Dayvon Love, the director of public policy for that organization, it seeks to advance the public policy of, quote, black people in the city through youth leadership, development, political advocacy, and autonomous intellectual innovation.

And then, again, pursuant to the declarations attached to the complaint that was filed, the plaintiff, Erricka Bridgeford is a community activist in Baltimore and the cofounder of Cease Fire Baltimore 365, which is, according to the affidavit, organizes quarterly, quote, cease fire weekends, end of quote, in Baltimore City. And then the plaintiff Kevin James is listed as an activist and community organizer. And his declaration is that it's in the Baltimore area. I don't know that he specifically listed that he's a resident of the city of Baltimore, but that is contained in the affidavit.

Is that a fair summary in terms of what has been filed thus far?

MS. GORSKI: Yes, Your Honor.

THE COURT: Okay. Thank you very much. And so with that on the standing matter, Ms. Moore or Ms. Walden or Ms. Lynch, I'll be glad to hear from you on behalf of the Baltimore Police Department and/or Commissioner Harrison.

MS. MOORE: Dana Moore, I'll begin. Your Honor -- hello, can you hear me?

THE COURT: Yes, I can hear you. Yes.

MS. MOORE: All right. I heard another voice, I thought.

THE COURT: That's all right.

MS. MOORE: But Your Honor is correct, the defendants do assert that there is no injury to any of the plaintiffs unless and until the Baltimore Police Department accesses or otherwise uses the information as to a particular specific plaintiff. It's important to note, after Your Honor has decided, you know, a little bit more about each of the plaintiffs. They can always move forward for actions that impact them, they are not suing on behalf of either Baltimore or on behalf of an organization, they can only pursue claims for and related to themselves.

So with that, the -- we believe that the AIR Pilots Program can't even theoretically violate any of their constitutional rights, as I said, until the Baltimore Police Department accesses or otherwise uses the information as to them. Your reference to *Carpenter*, we think is very

instructive and very telling. The *Carpenter* case made clear that collecting the data was not the problem, it was how the data was used and collected and stitched together.

Here the -- we believe that it's not -- the collection of data alone cannot be grounds for asserting First or Fourth Amendment standing. For Your Honor to find otherwise you would have to overturn 35 years of jurisprudence that makes clear that aerial surveillance is within -- is constitutionally reasonable. Plaintiffs in this case have not shown any data that -- any fact or any indication that their own individual movements would ever be reviewed by the Baltimore Police Department or even, you know, PSS through the AIR Program.

There's a reason for that. The AIR Program is not able to reveal physical characteristics of individuals or vehicles. The data that is collected is only reviewed under certain limited circumstances. Specifically, if there's a call that is assigned an incident number that relates to one of the four enumerated terms, that is the only way that anyone or anything would be identified through the AIR surveillance program.

Plaintiffs are -- what they're seeking here is a preliminary injunction. And they can't get a preliminary injunction on the contingency that at some time in the future it's possible that their constitutional rights might be

violated. And the only way that this could happen is if they were near a crime. This is speculative. And that is not the purpose of an Article III claim. That's not grounds -- that's not appropriate grounds for the issuance of a preliminary injunction.

Here, the plaintiff's constitutional rights are not implicated, again, unless and until the Baltimore Police Department uses the data collected by the AIR Program to track movements that are attributed to them. That has not happened. That is not likely to happen. With respect to Leaders for a Beautiful Struggle, they're -- in reading the declaration all of their assertions are speculative. They use the words we worry about surveillance, we're gravely concerned about surveillance, we expect that their partners might change how they interrelate with them, information could be recognized. These are fears. These are not real injuries that have actually occasioned to them or even are likely.

With respect to Ms. Bridgeford's declaration there she states that it's likely that the Baltimore Police Department would generate an individualized report about her. But that is not even remotely likely, given the purpose, limited scope, limited use of the AIR Program. She asserts that the AIR Program threatens her ability to effectively conduct her work that she does for Cease Fire. But, again, that is speculative. That is a forward-looking fear. It's in

paragraph 17 that she really gets to the nub of her claim, which is she feels that the AIR Program is -- and this is, you know, right from the declaration -- is a lazy form of policing. And that real nub here. That's the real injury that they disagree with the use and the purpose of the program.

With respect to Kevin James, again, his claims are speculative. I believe that I would be in the vicinity of the crime. This is all speculative. None of this has actually happened. There's been no actual injury. He's looking very, very forward into time about the possibility maybe that he would associate with someone who was near a crime. These are not injuries that can confer today, standing to pursue a preliminary injunction. Thank you.

THE COURT: Ms. Moore, you had noted in the papers, on behalf of the Police Department and the Commissioner, that the -- not only your view that the collection of the data cannot be a search, but that PSS is a third party, not a government actor. But clearly PSS in exercising powers of the state, it carries out state action for purposes of Section 1983; correct?

MS. MOORE: I don't think we make that claim. I think that plaintiffs make that claim, Your Honor.

THE COURT: No, what I'm saying is that it's clear that, just quickly with respect to standing on the matter, of

whether or not it is speculative and whether or not it satisfies injury in fact, in terms of the contention that it's an unconstitutional search by way of aerial surveillance there is no dispute, is there, that to the extent that PSS exercises powers pursuant to the contract with the City of Baltimore, with the Police Department, it is exercising state action essentially, that's not really an issue, would you agree with that.

MS. MOORE: Sure. Yes.

THE COURT: All right. I'm just trying to make sure that we're clear on that.

Ms. Gorski, anything further on the standing issue in rebuttal?

MS. GORSKI: Thank you, Your Honor. I think now it is very clear that defendants concede that PSS's initial collection of information is attributable to the BPD. And it is also clear that defendants are not disputing that plaintiffs will be subject to PSS's initial collection. As I mentioned earlier, the 2nd Circuit decision in *ACLU v. Clapper* makes very clear that this collection itself is a cognizable Fourth and First Amendment injury.

The Fourth Circuit's opinion in *Wikimedia* also makes this point clear. The government had argued in its briefing -- isn't flushed out in the opinion, but if you read the appellate brief it is clear that the government argued in

its briefing that the collection alone was not an injury. And the 4th Circuit rejected that argument.

Just a couple other quick notes. Defense counsel referred to 35 years of precedent and the fact that in finding standing for plaintiffs this Court would have to overturn 35 years of precedent, we obviously disagree with defense counsel's view of the aerial surveillance cases, from the decades old aerial surveillance cases. But those questions go to the merits, not to standing.

And then finally, defendants characterize as entirely speculative the plaintiffs' assertions that they are also substantially likely to have the BPD and PSS develop individualized reports on them, on both plaintiff James and plaintiff Bridgeford. Plaintiff Bridgeford having explained that they're substantially likely to be in the vicinity of one of the four target crimes. And there's no evidence to the contrary in the record. They have clearly established a substantial risk that they would be subject to individualized reporting.

So while the collection alone is sufficient to establish their standing, in addition to plaintiff under substantial risk standard articulated in the Supreme Court's decision in *Susan B. Anthony List,* these two plaintiffs have also established standing with respect to the individualized reporting. Thank you, Your Honor.

MS. MOORE: Your Honor? May I respond briefly, Your Honor?

THE COURT: Yes. Go ahead, Ms. Moore.

MS. MOORE: Okay. So with respect to the collection of data, it's very important to understand and to note that the images that will be collected through the AIR Pilot Program will be collected at a -- at one pixel per person, which you cannot identify a person, you cannot identify a specific car, you can't determine what a person's ethnicity is, you can't determine any distinctive clothing. There will not be any indication of who or what is captured by the data unless and until there's a relevant crime that then is able to link up to the site and use additional surveillance tools that are already present in Baltimore. So when the plaintiffs assert that they're fearful that there will be an individualized report created by them, that is mere speculation.

And with respect to Ms. Bridgeford she, in her own declaration, states that her work causes her to be present at the scene of a murder within hours after the murder has occurred or up to two weeks thereafter. So her work, by its own definition and description, does not cause her to fall within the scope and purpose of the AIR Pilot Program. The AIR Pilot Program is intended to look at what happened, when it happened, not after a crime has occurred. So she, by

definition, by her own words, takes herself out of the scope and range of the AIR Pilot Program.

And with respect to Kevin James, his description of a work is very vague, it's very speculative, the likelihood that there would ever be an individualized report about him is really slim to none, just based on his own description of the work that he does and how he navigates the public ways of Baltimore.

It's also -- I wanted to include that with respect to the chill, the plaintiffs do use that word in their declaration. And, again, there is not a specific present objective harm or threat, or specific future harm to any of these plaintiffs. These are all plaintiffs that do their work very publicly. They rely on media and social media to advance their causes. But they are not individuals that are even by their years of description of their work, present at any of the specified crimes that are the subject and focus of the AIR Pilot Program.

THE COURT: Just to finish up and go to the matter of the preliminary injunction and the standards, I would just note that, Ms. Moore, that the 4th Circuit has held -- when it comes to the matter of the First Amendment claim, the 4th Circuit has held consistently that standing requirements are somewhat more relaxed in First Amendment cases; correct?

MS. MOORE: I'm not going to argue with Your

Honor.

THE COURT: I mean, I think that really the First Amendment claim follows the Fourth Amendment claim. I think that the whole issue of standing really does focus, I think, on the matter of the Fourth Amendment claim. And the thrust of this, just so members of the public who are monitoring this, just I think, when all is said and done, the issue here on the matter of standing is that the plaintiffs argue that the injury in fact is the collection of the imagery data, which itself constitutes a search under the Fourth Amendment, with the actions of Persistent Surveillance Systems being attributable to the Baltimore Police Department. Is that a fair one sentence summary of the plaintiffs' position, Ms. Gorski?

MS. GORSKI: Yes, Your Honor.

THE COURT: Okay. And from the point of view of the defendants, the defendants have essentially argued that there is no standing to challenge a possible future search with respect to the data that was captured by PSS and may or may not be reviewed by the Baltimore Police Department. Is that a fair one sentence summary from your point of view, Ms. Moore?

MS. MOORE: Yes, Your Honor. And I would just add that all of the data that is collected is based on what is available in the public view. There is no reach into private spaces. And so there is no reasonable expectation of privacy

as any of these plaintiffs navigate Baltimore's public ways.

THE COURT: All right. We'll get into the matter of that on the merits in a minute, in terms of likelihood of success on the merits, but I think that just for purposes public consumption I think I fairly summarized what the standing issue is. Plaintiffs position being that the injury in fact occurs the minute of the collection of imagery data, which they contend itself constitutes a search. And the actions of the private company are attributable to the police department. And the defense position is that is speculative and it's a possible future search.

So with that, let me just focus if we can next on essentially the criteria here with respect to a preliminary injunction. As you all well know, the standard for granting a preliminary injunction, as set forth under Rule 65 of the Federal Rules of Civil Procedure. It is clearly a, and consistently held to be, an extraordinary remedy involving the exercise of very far reaching power to grant a preliminary injunction. And in determining whether to issue a preliminary injunction this Court must follow a test as set forth by the United States Supreme Court in *Winter versus Natural Resources Defense Council*, 555 U.S. page 7, a 2008 opinion of the Supreme Court.

And essentially the factors that we will be addressing this morning are, first, the movant must be likely

to succeed on the merits. Secondly, the movant, the petitioner, the plaintiff is likely to suffer irreparable harm absent preliminary injunctive relief. Third, that the balance of equities favors the movant, the plaintiff in a case. And, finally, that an injunction is in the public interest. That is the clear criteria here, which the Court must address this morning.

And the 4th Circuit authority on that in recent cases is *League of Women Voters of North Carolina versus North Carolina* 769 F.3d 224, a 4th Circuit opinion in 2014. So that is the standard here. And it is -- essentially the plaintiff must show more than a grave or serious question for litigation, instead it bears the heavy burden of making a clear showing that it is likely to succeed on the merits so we're not deciding this case today in this hearing, but we are dealing with the matter of whether or not the plaintiffs satisfy those criteria, so as to be entitled to a preliminary injunction.

So what I propose to do here now on this analysis is to proceed in that fashion with the -- first, the criteria of the likelihood of success on the merits. And we'll focus first upon the Fourth Amendment claims set forth in Count 1, the issues being whether the -- we'll call it the AIR Program, which is essentially the Aerial Investigation Research. Again, for members of the public, the legal community loves

acronyms. But the AIR Program is for the Aerial Investigation Research. And then secondarily -- first, whether it constitutes a search within the meaning of the Fourth Amendment. And secondly is the program reasonable under the Fourth amendment.

And with that I'll be glad to hear from plaintiffs counsel. And I believe Ms. Gorski you indicated that I thought you said Mr. Wizner or Mr. Kaufman or Mr. Wessler would be addressing that; is that correct?

MS. GORSKI: Your Honor, Mr. Kaufman will be addressing the plaintiff's Fourth Amendment --

THE COURT: Mr. Kaufman, glad to hear from you.

MR. KAUFMAN: Thank you, Your Honor. Glad to join you here. As Ms. Gorski pointed out, the BPD's program is the most ambitious surveillance program ever deployed in an American, using military technology that has the potential to drastically change our democratic society. It's a system that will create, for the use of law enforcement, a rolling 45-day log of plaintiffs' and other Baltimorean's movements. It imagines no role for the judiciary at all. And all of that amounts to an unconstitutional search under the Fourth Amendment.

Now, first defendants collection of plaintiff's location information is a Fourth Amendment search, which is the threshold question under the Fourth Amendment. And the

main reason is simple, no one anywhere reasonably expects that government cameras in the sky will record their whereabouts, and those of an entire city's population, second by second. Now, the BPD argues that this isn't what their program does. Because it says we will only collect dots. Ms. Moore said today that this program does not go into private lives. But this is wrong. First putting aside for one second the dots. The underlying location information that will be collected under this program is far more rich and specific than the information even at issue in *Carpenter*. There, cell site sectors can be quite large. But here movements will be captured down to a yard.

Now, as to the BPD's argument about dots and the identifiability of images that the program will capture second by second over the entirety city, in *Carpenter* the Supreme Court rejected the proposition that influence insulates the search and that's something that dated back to the *Kyllo* case years before. The Court observed in *Carpenter* that the government could, in combination with other information, seduce a detailed log of the defendant's movement. And that was sufficient to render it identifying and trigger the Fourth Amendment.

And it's also worth pointing out that the information at issue in *Carpenter* was not automatically identifiable to a person or their ethnicity or their race or

their name, because requests for cell site information are made as to phone numbers. And so when a request is made, you know a phone number and you link that with general location information, but you still have to go through investigative steps to link that to a name. And we pointed out in a reply brief, in the 6th Circuit decision that went up to the Supreme Court in *Carpenter*, there's a nice explanation of all the work that the FBI agents had to do just to link the location information and make it meaningful as to the defendants.

Third, it will be exceedingly easy for the BPD to identify the dots. And we go through this in our initial brief on page 17, but it's worth just pointing out a few points from there. First, it is easy to roll tape backwards and forwards in time and find locations that are automatically identifying to certain people. Next, we point a study out in our briefing that shows that -- and this is an unsurprising finding I think -- that just four unique location points are enough to identify 95 percent of people. And this makes sense, it goes to the heart of the rationale in *Carpenter*. Which is that the whole of our movements, whether or not one point by itself is observable by another person, are unique to us. And they reveal sensitive information and they implicate a lot about our private lives. And that deserves protection under the Fourth Amendment.

Another reason that it would be easy to convert

these dots into people, these elements of the BPD and PSS's own contract it's written right in there, that PSS will integrate data from the city's closed circuit television security cameras as well as its automatic license plate readers, in order to ensure that people are identified. And make no mistake, the AIR Program exists to identify people. And even ignoring the use of CCTV or ALPR, as I explained just now, the collection is a search because identification is easy, but these systems make identification even more attributable. And they're properly considered relevant to that question. The BPD puts them into the contract. PSS will have direct linkages to information. It even talks about reformatting some of the data systems to more easily digest that information. It doesn't go into specifics. And so those things bear very strongly on whether, as Ms. Moore says, this program does not go into private lives.

Another point here is that this -- the collection of this information is not simply an assortment of dots or tracks, it is a time machine. Never before did police have perfectly reconstructed even one person's past movements over days or 12 hours or weeks or months. And never could they even dreamed of reconstructing a entire city's populations movements that way. And that goes, again, to the heart of what the *Carpenter* court was concerned about. Because this data collected by defendants will grant the police access to a

category of information that is otherwise unknowable.

The government points to, you know, it has a few other arguments about why this is lawful. And first it argues that these cases from the 1980s about aerial surveillance prove that aerial surveillance, period, is constitutional under the Fourth Amendment. And I don't want to belabor the arguments here, I think we've pointed it out multiple times, but those three cases approved of transitory, targeted, naked-eye surveillance of static locations, not long-term, indiscriminate, technology-assisted surveillance of people's movement. And even in the 1980s, after these cases came out, if you look at our brief on footnote 45 in the first brief, we point other courts that at that time, understood that the limitation on those holdings and the fact that they were not speaking to uses of advanced technology, like the AIR Program put into place, you know, about 25 to 35 years later.

THE COURT: Mr. Kaufman, if I could just interrupt you just for one second, just so we're clear.

MR. KAUFMAN: Sure.

THE COURT: I didn't mean to interrupt your argument. I just want to make sure we're clear. You're not suggesting that this is a 24/7 program, 24 hours a day, 7 days a week, because as I understand the Professional Services Agreement, which has been filed here and actually is, I think an addendum to your complaint filed on April the 9th, the

planes are to fly about 40 hours per week over a six-month period, and they are essentially designed to provide recordings of past activities not live surveillance, correct? So we're not talking about a camera in the sky that's constantly on 24 hours a day, 7 days a week; correct?

MR. KAUFMAN: That's right, Your Honor. And the defendants point out that this is just going to be 12 hours a day and they believe that that's a proper frame. And we strongly disagree with that.

First of all, this is daily collection. This is not a one-time, 12-hour flight. This is daily collection, 12 hours a day, we're talking about 80 hours a week, that will be held for 45 days automatically. So to try -- I understand why defendants would like to ship the frame into a 12-hour mode. But that's just not even on the terms of what the defendants have offered in their contract what is going to happen.

Now, absolutely, we would say that 24-hour, round-the-clock surveillance is worse than 12, but this is still the most comprehensive mass surveillance program ever deployed in an American city. I think if you're thinking about reasonable expectation of privacy, I don't think that it is reasonable, or people reasonably do expect that there will be this kind of surveillance for 12 hours a day either. So I don't think that narrowing the time frame to 12 really helps. It also raises a question of how long of a break the

defendants think sufficiently reset the clock on their surveillance. And they haven't suggested that there is a magic number there. And I don't think there is one. And that's because in reality, this is a constant, for all practical purposes, this is constant surveillance every day, aggregated over a 45-day rolling period. And so focusing on the 12 hours is just not enough.

I also point out, the BPD argues in its brief that, you know, it's not continuous, so leaving the numbers aside this isn't continuous surveillance. And so, therefore, *Carpenter* doesn't touch it and it's a constitutional program. But in *Carpenter* it was not continuous surveillance either, this is cell phone tracking. And you can leave your phone at home. You can turn it off. And the times that data is generated when you're using your cell phone, is not a minute by minute catalog of your movements automatically. It's whenever the cell phone talks to the tower. Here this is a second-by-second capture. And so as I said, at the top, it's a much more rich pool of data than even was at issue in *Carpenter*. We've also pointed to some courts that I don't think you need to even go there, but there has been a lot of suggestion that *Carpenter*'s reasoning would even apply to shorter collection of location information using advanced technology. And so I just think that the 12-hour focus is not a winning argument for the defendants here.

Ms. Moore also suggests and the defendants in their briefing also suggest that there is some blanket rule that people lack a reasonable expectation of privacy when they are in public, full stop. That's just not the case. The main case they cite for that is *Knotts*. And *Knotts* itself cabins its holding to movements from one place to another. The *Carpenter* court doubled down on that reading of *Knotts* explaining that it involved a discrete automotive journey. And that is a very different kind of surveillance than what the AIR Program proposes to do. And even *Carpenter* itself, talking about its own holding, said this case is not about using a phone or a person's movement at a particular time. It's about a compendium of movements and what the whole of those movements add up to in terms of revealing the intricacies and the privacies of a individual life.

The other case the government tries to use to argue about no expectation of privacy when you're in public is *Jones*. But there five justices agreed, in concurring opinions, that longer term location tracking violates a reasonable expectation of privacy, regardless of whether those movements were disclosed to the public at large. So, again, there is no rule that when you are in public you forfeit your Fourth Amendment rights. And certainly any sort of gesture at that rule through *Carpenter*, post *Carpenter*, just absolutely cannot survive.

Just a couple more points on the Fourth Amendment argument. There is no exception to the warrant requirement for this program under the special needs doctrine. The defendants don't even use that phrase. And I think that's because it's just not available to them. Ms. Moore today said this is was a constitutionally reasonable crime fighting initiative. The contract says that the purpose of this program is to assist BPD in investigating and reducing violent crime in Baltimore City. These are classic law enforcement needs, that do not qualify under the special needs doctrine to excuse the government from getting a warrant.

And related, both cases also emphasize that the gravity of the threat alone cannot be dispositive of whether law enforcement's actions are constitutional or reasonable. And as the defendants have acknowledged, our plaintiffs are very involved in Baltimore in trying to solve the ills that are afflicting the community and their communities every single day. But whether or not the BPD is the proper policy making entity to come up with solutions, the Constitution put some of those policy off limits. And it certainly puts the AIR Program off limits. Go ahead, Your Honor.

THE COURT: Go ahead. Just you mentioned *Jones*. I would note that the *Jones* case in 2012, which involved the placement of the Global Positioning Device, the GPS device on the vehicle, the five votes in the majority did not all agree

on the same premise. Justice Scalia did not even address the *Katz*-based, reasonable expectation of privacy framework, he essentially evaluated it in the context of trespass. And some of his colleagues who voted with him did address the Katz-based analysis; correct?

MR. KAUFMAN: That's correct, Your Honor. I didn't mean to -- I hope I didn't imply that the majority --

THE COURT: No, no, just so the record's clear that the -- we're looking at -- although I'm reading the *Carpenter* -- I note Mr. Kaufman that you and Mr. Wizner and Mr. Wessler were actually counsel in the *Carpenter* case before the Supreme Court; correct?

MR. KAUFMAN: We were, Your Honor.

THE COURT: And I've noted that, obviously, Justice Kennedy in his dissent was critical of the whole Katz analysis and reasonable expectation of privacy that really -- that is really the analysis that we undertake in the aftermath of *Jones* and certainly after *Carpenter* in terms of the, essentially, the expectation of privacy set forth in the 1967 opinion of *Katz versus the United States*. That is the analysis that has to apply here; correct?

MR. KAUFMAN: That is correct, Your Honor. And just back to the point about *Jones*, yes there was five justices agreeing in concurrence on a *Katz* theory, but I think it's proper to read *Carpenter* as basically implementing those views

as the law of the land. The opinion in *Carpenter* cites those concurrences multiple times throughout its analysis. And so I think it's reasonable to go back and read the meeting of those five concurring justices minds as endorsing the arguments that I was just talking about.

I just have one final point on the Fourth Amendment merits. Because the government has not even offered a special needs argument, the fact that this is a warrantless program ends the inquiry for the Court on reasonableness, because that is how the analysis operates. But I do want to just comment on some of the arguments about the BPD's rules that it has put in place through contracts, some of which needs to be -- have been expanded upon in more detail in Mr. McNutt's declaration. But even taking these rules, on their own terms, they are unreasonable under the totality of the circumstances, which would be the analysis if you somehow did get into a reasonableness analysis there would be totality of the circumstances.

Just very quickly, one, there's no judge involved in this program at all. And if you look back at the *Riley* decision from the Supreme Court several years ago, there's that wonderful quote from Chief Justice Roberts where he says, "the revolution was not fought for the right to government agency protocols." And that is exactly what the BPD is offering here. It is offering an unwarranted system that is

not supervised by the judiciary, and making promises that the executive will respect the rights of individuals. And that's simply, as the Court explained in *Riley*, not how the Fourth Amendment works.

Another point on reasonableness is that because the collection is so enormous at the outset, minimization of irrelevant data or the private data of people who do not come under suspicion later on needs to be strictly implemented at the back end. And that is just simply not the case here. We have a 45 rolling day log of basically 600,000 people at a time. And the fact that that data has promised to be deleted at the end of that period is certainly not the kind of strict minimization requirement that the Fourth Amendment would propose, even if we were in a reasonableness analysis.

Another point, the unauthorized use of data by PSS is subject only to PSS self reporting. That is not the kind of contract term or minimization requirement or even government protocol that you would expect to see in a Fourth Amendment compliant situation.

So I think I'll rest there. If the Court has any questions I'm happy to answer them.

THE COURT: Well, I may in a minute. But let me just hear from the Police Department and from the City Solicitor's Office and I may have questions to follow up on all this.

Ms. Moore or Ms. Walden, whoever wants to address this, be glad to hear from you.

MS. MOORE: Your Honor, I'll begin and would ask that Ms. Walden, if I overlook something she feel free to step in. And I want to begin by agreeing with Your Honor that we believe that the considerations on whether or not to grant a preliminary injunction are as you stated, set out in Winter versus Natural Resource Defense Council, which is a 2008 case. We agree with the four factors that we enunciate and agree that all four factors must be met. They have to be considered separately. Most importantly there is a presumption that a preliminary injunction will not issue.

In this case that presumption has not been met. Here's why: The AIR Program does not constitute a search. Much of what plaintiff's counsel has said in describing the program is not correct. First of all, it is not a rolling 45 day, continuous collection of data. This, in my opinion, is one of the frailties of the program, it can only collect -- and this is by agreement and by technology -- 12 hours of data per day. It can only -- the AIR Program can -- it's done by three airplanes, you know, flying over Baltimore. And they can only fly weather permitting. The planes cannot collect data at night. The data that is collected cannot -- and I said this before -- cannot identify a specific individual. It cannot identify a specific automobile. It cannot identify

demographic. It cannot identify clothing. It's not designed to do that and it's not able to do that. The fact that there is not a continuous surveillance or continuous collection of data, we believe takes this squarely out of the *Carpenter* consideration.

I also want to address the argument that there's, quote, no judge involved in this program at all. And here it's helpful to remind everyone on this call that the Baltimore City Police Department is a police department that is under consent decree. We are -- we meaning the police department and Commissioner Harrison and all of his officers, are beholden to use the Court -- the police court monitors, the monitoring team whenever they are attempting to do something novel. And that's exactly what happened here. Back in December of 2019, when Commissioner Harrison determined that, yes, we will try this, yes, we will institute this pilot program, one of the first things he did was consult and confer with the police monitoring team, consent decree monitoring team, to let them know, along with the Justice Department, that this is a decision that the police department in Baltimore City has made.

And, of course, all of the decisions that the police department for Baltimore City makes must relate to constitutional policing. If it's not constitutional, that obviously presents a problem. So those conversations were had

in December of 2019.

THE COURT: Just if I can, Ms. Moore, just for the record, again, for public dissemination here. The consent decree which you make reference is in United States versus Police Department of Baltimore City, civil number JKB-17-0099. As reflected in paper No. 2 in that file, as modified in paper No. 39. So that is the consent decree to which you're making reference.

MS. MOORE: Yes, Your Honor. (Audio interference) And I believe that the consent decree went into effect, I want to say in 2016, 2017 at the very latest. And we are still under consent decree. We meet regularly with Chief Judge Bredar, the Court monitors are regularly in communication.

THE COURT: Just for the record, again, just so the record is clear for the public, that does not mean that the Court in that case under the consent decree has ratified this question. This question is separately before me. And it does not mean, and you're not suggesting that Chief Judge Bredar has signed off on this program; correct?

MS. MOORE: You are so right.

THE COURT: Correct, from the point of view of the plaintiffs on this, from the ACLU point of view? There's no confusion on that. Clearly, the consent decree does not mean that the Court has ratified this program; correct?

MR. KAUFMAN: Absolutely not. In fact, DOJ said

explicitly it was not approving or disapproving of the program and it has never been submitted to the Court.

THE COURT: That's fine. Go ahead, Ms. Moore. I'm just being careful so the public understands that we're all in agreement as to the existence of the Consent Decree and also the legal effect or lack thereof as to the question before me now.

MS. MOORE: Correct. And to be very, very clear, that role confers no legal effect on the efficacy and the constitutionality of this program. Zero effect. But I raise that simply to let the public know, and everyone who's listening that we are still under consent decree and we still operate under a constitutional policing framework.

I also want Your Honor to know that, in terms of evaluating the efficacy and the propriety of this program, the police department has, within the contract, agreed to have independent evaluators through Morgan State University and I believe New York University, but I'm not exactly certain of that. We have handed over the evaluation of this program to others. It is not going to be the police department of Baltimore City assessing whether this program is efficacious and how it's operating. We have built in protection to make sure that the stated uses and purposes are stuck to and that there's no strain.

When we decided to pursue this program it was

announced publicly. There were public meetings. There were meetings on Facebook live, which I understand to date, just as of yesterday, there were 30,000 views of the education tool. It still remains on the city's public television station, which is Charm TV 25. If anybody's listening now you can go right there right now and see for yourself what this program is about.

So let me talk about what it's about. The program is designed to evaluate -- it's a pilot program, first of all. And it's designed to evaluate the extent to which the AIR Program might assist the Baltimore Police Department in solving and closing some of the city's most violent crimes. And those are murders, shootings, armed robberies, and that includes carjackings. And it's important to note here that these crimes have not abated or subsided even while this city is under stay at home orders by both the governor and the mayor of Baltimore City. Murders actually are higher today than they were this time last year. So, clearly there is a public need for something to respond to crime.

The AIR Program is designed to take sequential aerial photographs at a resolution of roughly one pixel per person. And at that resolution it's not possible to discern personal characteristics from the photo. Again, the program is limited to 12 hours of continuous data collection during daylight hours. And only when the weather permits it.

In order to actually use the data, there must be a qualifying crime, one of the four that I just mentioned. And only then would PSS review the data, analyze it, and provide a report to the Baltimore City Police Department. They would have to use conventional, ground-based imaging resources such as city watch and license plate readers in order for this data to even be usable. And, again, we just hope that it helps the police department solve and close crimes. More details are in some of our papers and you can get details from the actual contract, which is exhibit -- part of the plaintiff's submission.

I'm going to tell Your Honor what this program will not do. And this is what takes this out of the *Carpenter* analysis. The program will not provide real time surveillance or track CSLI and try not to use acronyms, but that's Cell Site Location Information. That will not be collected, cell phone data will not be collected through this program. The AIR Program's data will not determine who a specific individual is or what a particular car is. It will not randomly review collected images. In other words, the person, the professionals that will be working this program will not just randomly view collected images. And they will not be able to target any of these three plaintiffs through that review. That's really important to note.

It will only work when there's an egregious violent

crime that is already known to have occurred. It is not predictive. The AIR Program will not determine if a dot representing a person or car entering a building or structure is the same person or car that exits that structure. That's one of the limits. That's a result of collecting data only 12 hours a day, not 24 hours a day, seven days a week. So it will not be able to stitch imagery together to tell a story of what this person did every single day for 45 days. It does not have that capacity. And, of course, there's no audio. So there will not be, you know, reaching in to hear conversations.

We talked about *Carpenter* and I think that we feel that the *Carpenter* case is one that, obviously, the plaintiffs rely on. This is a case they have to advance to the Court. But this is not a *Carpenter* case for a number of reasons. And let me enumerate just a few. Obviously, in *Carpenter* there was concern that the government had collected at least seven days, continuous days of cell site location information. And that's because they collected cell phone data, and as we all know, particularly today, we're all on our -- most of us are on our cell phones having this conversation, conducting this hearing. Our cell phones are with us pretty much 24/7. If you're like me -- not about me, but I keep both of my cell phones very close to me at all times because there's a need. And most Americans do the same. Our phones are almost an

appendage, an extension of one of our limbs. That is not the situation that we find with the data that will be collected through the AIR Program. It is so limited. It is not broad. And it's not intrusive and expansive in scope.

The AIR Program -- in *Carpenter* there was the Court specifically limited the -- its ruling to cell phone data, CSLI, and that is just not what we have here. In fact, the technology that's contemplated by the AIR Program really wasn't even available at the time that the *Carpenter* -- not involved and the *Carpenter* decision was made. The Supreme Court in *Carpenter* held that a person maintains a legitimate expectation of privacy and the record of their physical movements as captured by CSLI. And, of course, the AIR Program will not use CSLI, nor will it create a record of an individual's physical movement as those movements were contemplated by the *Carpenter* case. The *Carpenter* court found it significant that mapping a cell phone's location over the course of 127 days provided an all encompassing record of the defendant's whereabouts. That is not our situation here. The AIR Program will not capture cell phone data, nor will it provide an all encompassing record of anyone's whereabouts. It's simply does not work that way.

One of the compelling arguments in the *Carpenter* case was that by collecting all of the data that was collected regarding Mr. Carpenter, the government was able to really

stitch together a book of Mr. Carpenter's life over the course of 127 days. And that's what really pulled the story of the intimacies of Mr. *Carpenter*'s life. And that is what, in part, the Court found so offensive and so concerning. But that's not our case here. That is not the situation here, the AIR Program will only capture data, movement that are in the public. And, again, it's limited to 12 hours a day. So it's not an intrusive look into anyone's life. It will only capture what is in the public and what these plaintiffs really have no reasonable expectation of privacy in those movements. The program does not -- it's not designed to capture the intimacies of their lives and it will not capture the intimacies of their lives. And that was the situation in *Carpenter*.

THE COURT: As I understand it -- if I can just ask a follow-up question, as I understand it, the imagery as summarized in the Professional Services Agreement contract, which is attached to the complaint from PSS, as I understand it, the imagery is so limited, I think the phrase is one pixel, p-i-x-e-l, per person, meaning that an individual appears as a dot, that the individual characteristics are not observable, your representation is that they are never observable?

MS. MOORE: Correct.

THE COURT: Under no circumstances could the

individual characteristics be observable, even upon further review, later review, that they still could not identify a particular, specific person; is that correct?

MS. MOORE: That is correct, Your Honor. And that is why the utility of the AIR Program is so reliant on ground-based surveillance systems that are already in existence in Baltimore. In a nutshell, for you and the public that are listening, the AIR Program works by identifying a dot that is -- has gone to or was present at or has left the scene of we'll just say a murder. That dot would be tracked, where did it start. The dot was present at the time of the murder and then it left the scene. The utility of tracking that dot is not realized or appreciated until such time as the consultant is able to match that dot to data that is collected, or has been collected by the ground video surveillance cameras that are located throughout Baltimore, and license plate readers.

The program is unique. It's expansive. We like to -- we hope that it's effective, but it does have limitations. It only works with existing surveillance tools. And good policing, good detective work, that's able to match up. And this is my next point why this situation, the AIR Program is not the same as that of cell phone data collected in *Carpenter*. It's complicated, it's not easily -- you can't just simply download the data and say, oh, there, we've got

our person. We know, you know, who this is, what this is, where they came from and where they went. You've got to spend time reviewing the data. It takes two hours to find one hour of data. You've got to match it to data collected from other sources. It's complicated. The program does not have some of the -- it's been referred to as a eye in the sky, but it's not really that. It's a camera in the sky. But it doesn't have infrared, telephoto, zoom, or other technologies that one might think would be really effective to make this more valuable. Any over -- pardon me.

MS. WALDEN: This is Lisa, do you mind if I add in just a couple of points?

THE COURT: Go right ahead, Ms. Walden. Go ahead.

MS. WALDEN: I think it would be helpful for the Court, and to anyone who hasn't seen these photos, to help appreciate the type of data that the aerial cameras are collecting, to take a review of document 3-1 in the docket. And at page, I think, it's 9 of 17 you can see from the actual images captured by the camera. And as you'll see there, they're very grainy, they're very distant. And I think it sort of reinforces the point the Solicitor was making that there's no personal identifiable information in these photos. You can't tell a man from a woman. In fact, you might not be able to tell a person from a small vehicle.

So that is the raw data at issue here. And further,

to what the solicitor was commenting on, that sort of gives a better holistic understanding of the way the program is to operate, and also further distinguishes it from *Carpenter*, because of the quality of these photos, in order to -- the photos themselves are really useful for very little. In order to reduce them to useful, actionable information that could assist in the investigation of a murder, shooting, armed robbery, or carjacking, the contractor has to apply -- it's one hour of analyst time to track one of these dots for two hours of real time movement.

So it's enormously laborious and it requires the use of very sophisticated algorithms to convert this grainy photograph into something resembling a track, which itself still does not identify the subject, as the solicitor was saying. You do still have to -- to reduce the dots to an identity, you would have to find some sort of a conventional, ground-based resource to identify who the person in the picture -- what the car in the picture -- so I think those points are fairly relevant to the general understanding of how the system operates and also to why this really is not a *Carpenter*-type of situation. There is simply not the bandwidth to track every person in the city in the manner that the plaintiffs presuppose will occur. It's not possible as a practical matter. And the underlying raw data itself is no encyclopedic record of really much of anything. And I think

that's an important sort of clarification point. I apologize if I interrupted.

THE COURT: No, that's quite all right. Thank you very much, Ms. Walden. Thank you.

MS. MOORE: So, at base the plaintiffs argue that the AIR data collection program is a time machine. It simply is not. It's not a search. It's not a search that -- there's no requirement for a warrant. We believe that the Supreme Court and the 4th Circuit have already held constitutional far more intrusive aerial surveillance than what is contemplated by this program. And here we would refer Your Honor to *California versus Ciraolo* and *Dow Chemical versus United States*. And with that I'll rest on the -- unless you think I should add something on the first *Winter* factor.

THE COURT: No, before I hear further from Mr. Kaufman, I would just note that with respect to the two cases that you have mentioned, Ms. Moore, California versus Ciraolo, a 1986 Supreme Court opinion, which involved a helicopter a thousand feet over the defendant's enclosed backyard. And there were observations of marijuana with the naked eye and it was deemed not to be a search. Essentially, similar to *Florida versus Riley*, a 1989 Supreme Court opinion. Once again a helicopter above a defendant's home or private areas observing marijuana with the naked eye was deemed not to be a search. Essentially, in those two cases, as well as in *Dow*

Chemical versus United States in 1986, with respect to a standard floor-mounted aerial mapping camera, taking photographs of a commercial facility of 12,000, 3,000 feet, essentially the Supreme Court held in those cases that it was not a search.

Obviously, the position of the plaintiffs here is that the world is changing now in light of the Supreme Court's opinion in *United States versus Jones* in 2012, and the Supreme Court's opinion in *United States versus Carpenter* in 2018 dealing with cell site location information. Again, the legal jargon for which is CSLI.

So with that let me hear further from you, Mr. Kaufman. I'll be glad to hear any response you make on this and then I may have some follow-up questions of you as well.

MR. KAUFMAN: Okay. Thank you, Your Honor. Just a few points in response to that. No. 1, the purpose of this program is to identify people. That is the purpose of the program. And it's worth asking, after listening to defense counsel explain how blurry the photos are, and how meaningless the information is, why the defendants are going through with this program at all if that is actually the case. And the answers are both obvious and on the pages of the contract. They intend to use this information to identify people, because that is what the data is capable of doing. And that is what's going to happen.

Ms. Moore also says this is not a *Carpenter* case, and while in some respect that may be true, the differences make it an easier case not a harder one. The BPD says that the collection is not continuous. I already addressed that, but the collection by cell phone is just as -- it's even more choppy than the 12 hours of data that the government would be getting in one gulp under this program. And then, of course, they will be adding that together day after day for 45 days. To say that that is a meaningful difference between this case and *Carpenter* is just not correct.

THE COURT: Mr. Kaufman, if I can just interrupt you for one second.

MR. KAUFMAN: Sure.

THE COURT: I want to stay with you on this point. The Police Department has indicated in terms of the limitations of this system in identifying dots that really can't identify people. I just need for you to explain to me -- obviously, we're not trying the entire case here today, we're dealing with the matter of whether or not there is likelihood of success on the merit to the extent that you get a preliminary injunction immediately -- but with respect to the abilities of this system the -- there's more Ms. Walden had proffered that it may locate a dot that's at the scene of a -- of an area of a known murder, and it may try to identify a dot, be it a car or a person that may or may not go to

another area of the city.

That would -- obviously, the city, the police department is trying to solve crimes and locate people who have committed crimes. But the matter of just following a dot, obviously, has to lead to further, on-the-ground investigation. So I don't know that it's fair to say that, of course, they're trying to identify people. Of course they're trying to identify those who've committed crimes. But I don't know that that means that identifying where a dot moves means they're identifying people per se, just as to the surveillance itself. But I want to give you an opportunity to respond to my concern in that regard.

MR. KAUFMAN: Thank you. Thanks, Your Honor, and I appreciate that opportunity. I guess there's a few possible responses to that. First, just as a factual matter, we're talking about the collection of this information, PSS is a state actor, the government conceded that today. So for all intents and purposes we're talking about a collection of data that is in the government's hands. And that data is capable of identifying individuals. Now, whether -- and I appreciate the BPD wants to focus on what its current officers will be doing with the data. But that's not the focus of the Fourth Amendment claim. The claim is about collection of this data in the first instance by this the government, which is exactly what defense counsel conceded is happening here. And so that

is the proper focus of the pooled data.

Now as to how this stuff is identifying, again, the -- you can roll the tape backwards and forward to a specific place. If somebody's a homeowner, that's obviously identifying. We pointed to a study that shows that even some of these anonymous dots living around the city can be used to derive their identity fairly easily. And they've -- it's simply not relevant that the BPD hasn't put into its contract that that's what it's going to do. The point is the data will be collected and that data will be in its state revealing of that information.

And then the last piece, of course, is that -- and this is something, you know, candidly, it's acknowledged by the defense, it's acknowledged in the contract, it's pled in our complaint, but CCTV and the LPR systems will be used and integrated with the AIR Program. So it's simply wrong to say that this is a separate thing. They have tied its together by themselves and made that an explicit part of what they're doing here.

Another point, just following from *Carpenter*, is that it did not, as I said before, it was not so automatically identifying in *Carpenter*, just to review what the government had to do to make useful meaningful sense of CSLI, they had to flip defendants to turn state witnesses to corroborate defendant's presence in a large cell sector, that he was

actually participating in a crime at a particular crime scene. They had to obtain their own CCTV footage near the crime scene showing that the individual was nearby. The FBI agent combed through 13,000 location points to identify 16 points that placed him near the crime. All of that is exactly, if not -- it is exactly what the government tries to say insulates the collection of information from a Fourth Amendment search here. And that just simply cannot hold up even under the terms of *Carpenter* itself.

I've also -- I explained before, but I think worth pointing out again because the government insists on it, the idea that the data in *Carpenter* is continuous and the data here is not is just simply not true as a factual matter. As we pointed out, there is not a second-by-second catalog of cell phone ping information that your carrier has. That is not how it works. But here there will be a second-by-second track of an individual person as they move around the city. The purveyor of the system, Mr. McNutt has also described the system as Google Earth with TiVo, and that's what it is, it's a second-by-second ability to track location over time. That's what it is.

Again, in *Carpenter* the data at issue was about large sectors of, you know, wedge-shaped sectors that surrounded a cell phone tower. It was not a yard-by-yard ping as to a person's location. So the underlying data is even

more sensitive than the data that might just put you in a neighborhood or on a particular block. Here you know the stoop a person is sitting on because of these cameras.

One final point in response and then I'm, again, happy to answer anything else you would like, about the policies. And the -- the Department likes to -- wants to talk about the policies, but as we explained, they have not argued that a special needs analysis applies here. And that is the only way that you escape the warrant requirement as we pointed out in our briefs. And absent special needs, a warrant is required. And the bottom line is the Department has not sought a warrant to bless this program, as we point out in our first brief. It could not get a warrant to bless this program because it would effectuate a general search, the most reviled kind of search under the Fourth Amendment and, in fact, the reason that the Fourth Amendment was passed. And it does not intend to get a warrant at any point.

And so the protocols and policies are interesting. We certainly would applaud anything that the department has done to try to protect privacy through this program. But the fact of the matter is the program is designed to collect identifying location information about the plaintiffs and about 600,000 people in Baltimore. And that is not constitutional under the Fourth Amendment.

THE COURT: All right. Thank you, Mr. Kaufman. Let

me just ask you a few follow-up questions just, again, for purposes of the public understanding where we are here. Essentially, I had mentioned the Supreme Court cases in the 1980s, *Florida versus Riley*, *California versus Ciraolo*, and *Dow Chemical versus United States*, all of which essentially at that time established that individuals do not have a reasonable expectation of privacy on things which are observable from flights in navigable airspace. That was the state of the law as of the late 1908s; correct?

MR. KAUFMAN: Yes. Those cases were decided within a few years from each other. And, I mean, it's worth just talking for a moment about what those cases involved. They involved police, without a warrant, targeting an individual that they were investigating, using their police resources, a helicopter in one case, planes in another, flying at lawful altitude and flying over properties one time. And that is what they did. And, I don't think it takes a lot of imagination, you don't have to go 40 years into the future and read *Carpenter* to think about how those courts might have analyzed the situation differently if for 80 hours a week --

THE COURT: I understand. No, I understand your point on that. I'm just trying to assure for purpose of public dissemination we understand where we are here in 2020 on this question. Because with respect to these short-term, limited aerial surveillance, which were clearly just focused

on individuals, the United States Court of Appeals from the 4th Circuit, following that case law, clearly in cases which you all have cited on both sides, I believe, *Giancola versus State of West Virginia Department of Public Safety*, in which the 4th Circuit relied upon the Supreme Court jurisprudence I just mentioned, finding that a helicopter surveillance over personal property was reasonable under the Fourth Amendment, because it comported with Federal Aviation Administration regulations.

And then there was a 4th Circuit opinion in 2002, *United States versus Breza*, B-r-e-z-a, which upheld aerial observation of landscaped area involving a defendant's house, again, relying upon those trilogy of cases in the late 1980s. And then what you had is in 2012 the *Jones* case that dealt with the GPS system on a vehicle and the issue of expectation of privacy going back to the *Katz* case on expectation of privacy, which we've already discussed is the real analysis here.

And then we get up to *Carpenter*, the case in which you were involved, and two of your colleagues, in 2018, involving cell site location information, very much focused individually. Essentially, the issue becomes the ambit of *Carpenter* and I must -- I'm sure you've recognized, must address the language of Chief Justice Roberts in his opinion, because he specifically said -- and it was a five to four

opinion -- and in his opinion he noted specifically at 138 Supreme Court Reporter 2220, twenty two, twenty, it's 86 United States Westlaw 449, I believe, Our decision today is a narrow one. We do not express a view on matters not before us, colon, real time CSLI -- meaning cell sight location information or tower dumps. And then he goes on, We do not disturb the application of the *Smith* and *Miller* cases and prior opinions of the Supreme Court. And specifically Chief Judge Roberts said at that time, as you're well aware Mr. Kaufman, quote, Will call into question conventional surveillance techniques and tools such as security cameras, with respect to the limitation of that opinion. And the -- essentially then Chief Justice Roberts found that the acquisition of the cell site location information in *Carpenter* was in fact a search.

Which I think leads us into a question that I need to ask of you, do you have reference in footnote, I believe in a footnote in your initial memorandum, you have referenced to one opinion which followed the *Carpenter* case in the United States District Court for the District of Massachusetts, *United States versus Moore-Bush*, 381 F.Supp.3d 139, a 2019 opinion of that court, which is now on appeal to the United States Court of Appeals for the 1st Circuit. Are you counsel in that case as well?

MR. KAUFMAN: I'm counsel of amicus party in that

case.

THE COURT: All right. And the -- there the question becomes a matter of a pole camera. And I guess what I want to give you an opportunity to respond to is that the jurisprudence here, the view this court and certainly the 4th Circuit has been that the constitutionality of pole cameras had been upheld. And, essentially, these pole cameras operate -- in many instances they operate 24/7, they operate 24 hours a day, 7 days a week. And they record everything that happens on a particular street.

And the -- apparently in the *United States versus Moore-Bush* case, last year before the United States District Court for the District of Massachusetts, that court held that a pole camera was a search, running afoul of the Fourth Amendment. And also holding that, therefore, the use of that surveillance camera risked chilling First Amendment rights. The arguments you make here with respect to the surveillance program, the AIR Program of the Persistent Surveillance Systems, I gather would apply to pole cameras as well, would they not?

MR. KAUFMAN: Well, I don't think that this is exactly the same case at all as the pole camera case. Though, it's absolutely correct, and the *Moore-Bush* decision does a good job of this in the District Court, explaining why *Carpenter* leads the Court to that result, which as amicus we

do agree with that result.

What happened in *Moore-Bush* is I think eight months of continuous surveillance of an individual using, you know, when pole cameras started becoming, you know, part of ordinary law enforcement measures, they were rudimentary security cameras just put on a pole. And they would have to go change the tape every once in a while. And that's why they put it on utility poles so it looked like a normal activity and not tip anyone off. But the cameras at issue in *Moore-Bush* are eight months, they are controlled from a centralized location in the police department, they can be viewed, they can be manipulated, they can be zoomed, they can be panned, they can be tilted, they can zoom in through windows, they can look at license plates.

So I think what the Court in *Moore-Bush* is doing, and something this Court does not need to do in this case, is sort of take a look at what *Carpenter* means in a new situation with a new technology. But here we're not talking about challenging traditional surveillance methods in the case at all. In fact, my colleagues on the other side acknowledge this is unique and unprecedented. And so our argument does not require reading or overruling *Ciraolo*, or saying you know, flights like that that are ordinary parts of police practice for the last 30 years are not okay. In fact, our argument depends on *Ciraolo* to show that the Court was concerned about

concerns that went far beyond the limited surveillance in those kind of scenarios. And while CCTV and ALPR are relevant to the identification abilities of this system, they're written into the contract as we discussed, we're not challenging the use of sporadically located cameras. I'm not aware of any ALPR CCTV system that's as comprehensive as the AIR Program.

And so I acknowledge Chief Justice Roberts, and proper respect for the fact that he could only decide the case in front of him, along with the other members of the Court. And that's how all Courts should proceed, of course. But the fact that the *Carpenter* case didn't reach every other scenario doesn't mean that its logic doesn't compel a certain result in that case.

THE COURT: All right. Well, thank you very much, Mr. Kaufman on that. The -- with respect to the matter of likelihood, what we're in, so the public is aware, we're in the first step of a four-step analysis, the main step here in terms of likelihood of success on the merits, and whether or not the AIR Program surveillance is a search within the meaning of the Fourth Amendment and whether or not it is unreasonable under the Fourth Amendment. With respect to likelihood of success on the merits as to the First Amendment claim, Count 2, essentially as I understand it the defendant did not really address the merits on that, only that they

challenge standing. And the position of the plaintiffs is that any such monitoring will have a chilling effect on the rights of association of the plaintiffs.

Want to -- anything to add to that from the point of view of the plaintiffs, Mr. Kaufman, and then I'll hear from Ms. Moore and from Ms. Walden on the Fourth Amendment issue.

MS. MOORE: Your Honor, this is a Dana Moore. I was just wondering if I could respond very, very briefly to some of the comments that were just made --

THE COURT: Sure. Go ahead.

MS. MOORE: Thank you. With respect to the AIR Program, I just want to point out, and it's probably very clear, but I just want to be abundantly clear, the AIR Surveillance Program that we contemplate falls squarely within the air surveillance techniques that have already been found constitutional by the Supreme Court and the 4th Circuit. It's just that we're using that data that collected, we're using it differently. The collection system itself, it's exactly what has been done and been approved in other courts. Important to note that the *Carpenter* case is fairly limited. They actually cabined that decision strictly to CSLI.

Counsel -- addressing the state actor argument, I want to back off that a little bit, and here's why: Although, there was a contract that governs how this program will be operated, it's very important to note that this -- the police

department will get a very, very, very limited portion of the data that's collected. And will only get that data after it's been analyzed and found to be related to a particular crime. So the vast majority of the data that's collected, we'll never see. We'll never see because it's not relevant.

Counsel also said that the purpose of this program is to follow people to identify people. And that's not the case, it's to follow movement. They're asking why are we using this if it's not so clear. Because we are determined to find and use any tool that looks like it is possible to aid the police department in solving and clearing crime, so long as those tools are constitutional, which this tool is.

Counsel stated that the purpose of this program is to follow these plaintiffs. And that is a very dangerous comment to make. And I want it to be very, very clear, that is patently untrue. And it's incredibly irresponsible to state that that is the purpose of this program. It is not to follow these plaintiffs. These plaintiffs -- that is not the intention. If they were to show up at all it would be incidental and we would never even know, because it wouldn't relate to any of the stated crimes. Thank you.

THE COURT: All right. Well, just in that regard, without getting too deep in the weeds on that, that contention by plaintiffs is a matter that may have to be further reviewed in terms of discovery if that's the contention. And the

Police Department can certainly establish during discovery that that representation by plaintiff's counsel may not be correct. But that's a matter -- we're not going to be able to resolve that here today in terms of that contention. I hear what you're saying in terms of the contention of plaintiff's counsel in that regard.

MR. KAUFMAN: Your Honor, the --

THE COURT: Yes.

MR. KAUFMAN: Just to point out, I did not -- and I think the transcript will show -- I did not say the purpose of this program is to follow the plaintiffs. I just needed to point that out. That is not what I said.

THE COURT: I understand.

MR. KAUFMAN: Thank you, Your Honor.

THE COURT: I understand. There's nothing improper about what you've argued. That's fine. I'm just saying that as to that, in terms of your contention as to what the program can or cannot do, and the Police Department's response, no, it cannot track as definitively as you say, that's a matter that may have to be explored during discovery. I would just note that I think it's pretty clear that if a private entity exercises powers that were traditionally the prerogative of the state it is carrying out state action for purposes of Section 1983. There's a 4th Circuit case in 1994, *Conner versus Donnelly* that clearly establishes that.

So let me just go, if I can, to the First Amendment claim in terms of likelihood of success on the merits. If there's anything further that you all want to add for me as to the First Amendment issue in terms of, again, the likelihood of success on the merits the first of the four and the main of the four factors we're addressing here today, Mr. Kaufman.

MS. GORSKI: Your Honor, this is Ms. Gorski.

THE COURT: Ms. Gorski, that's fine. Be glad to hear from you.

MS. GORSKI: Great. Thank you so much. So on the First Amendment claim, again, I just want to emphasize the defendants have not disputed the merits of plaintiffs' First Amendment claim, they've only disputed plaintiff's First Amendment standing. The AIR Program on the merits substantially impairs plaintiffs' First Amendment freedom of association. And that's not just through some kind of abstract chilling effect. It concretely burdens and effects their work in the ways set forth in the plaintiffs' declaration.

The BPD is collecting a comprehensive map of the ties embedded in plaintiffs' everyday lives in their community-based work. And that collection itself, for standing purposes, confers a First Amendment injury. And that First Amendment injury is a substantial one. Which means that the government's program has to survive exacting scrutiny,

that is constitutional only if it is the least restrictive means of achieving a compelling state interest. And the AIR Program fails that test for the reasons that my colleague Mr. Kaufman has explained concerning the scope and the breadth of that program. Thank you.

THE COURT: All right. I would just note that it seems to me that the matter of whether or not there's a search and the matter of whether or not that -- there's a violation of Fourth Amendment necessarily effects the analysis with respect to a chilling effect as to First Amendment rights. I think both sides have mentioned the *Clapper versus Amnesty*, the 2013 opinion of the United States Supreme Court, which I think has specifically noted that surveillance itself does not give rise to an injury in fact, creating Article III standing. But I think it's been adequately briefed and I can review the papers in ruling on this, when I make sure to file the opinion by this Friday.

So in lining this out here --

MS. GORSKI: Your Honor, I'm sorry, if I may. One very quick point on *Amnesty*. *Amnesty* did not hold that surveillance itself cannot constitute an injury in fact. And in fact it was the *Wikimedia* case, a separate case, the other courts were very clear, including the 4th Circuit, that the collection of private information is itself an injury in fact. In *Amnesty* the issue was that the surveillance was entirely

speculative. Plaintiffs, according to the Court, would be speculating about the facts that they would be subject to the surveillance. Here, in contrast, plaintiffs are not speculating. Defendants do not dispute that plaintiff's information will be collected by the AIR Program. Thank you.

THE COURT: All right. Thank you very much Ms. Gorski.

And so with that let me just go to the issue of irreparable harm. Again, the law is very clear, so that the public understands that for this Court to issue injunctive relief as requested by the plaintiffs, the four factors that must be satisfied are; one, the likelihood to succeed on the merits, which is what we've been spending the last hour upon, as to whether or not this program constitutes a search under the Fourth Amendment. Secondarily, whether the movant is likely to suffer irreparable harm absent preliminary relief. Third, the balance of equities in favor of the movant. And, finally, that an injunction is in the public interest.

So in lining it up here, I don't want to ignore the second, third, and fourth requirements. The plaintiffs essentially argue that the irreparable harm is in the context of a constitutional violation. The defense's response is that there is no constitutional violation. I don't know that we need to spend a lot of time on the irreparable harm issue. It

is totally dependant upon this Court's determination of likelihood of success on the merits as to the issue of whether or not this is a search.

Is there anything either side wants to add on the irreparable harm analysis before we get to the balance of equities and the public interest, Mr. Kaufman or Ms. Gorski?

MS. GORSKI: Your Honor, the only thing I would add is that in our view the First Amendment analyses and the Fourth Amendment analyses are distinct. And so even if this Court concludes that the initial collection of information through the AIR Program does not constitute a Fourth Amendment search, it has to separately undertake a First Amendment analysis. And that analysis also has to take into account plaintiff's allegations with respect to the substantial likelihood that they'll be subject to individualized reporting. And the First Amendment burden must be considered separately as the irreparable harm analysis. Thank you.

THE COURT: All right. Ms. Moore or Ms. Walden, anything else you want to add on this.

MS. MOORE: No, we don't want to belabor the point. And we know that Your Honor has read our papers and will review them. We'll go with --

THE COURT: All right. Bottom line, again, so the public understands, all four criteria have to be satisfied. If you don't satisfy all four criteria, then the issue of the

matter of entering injunctive relief is within the equitable discretion of this Court. And, as I said earlier, it's a heavy burden that lays upon the plaintiff in seeking injunctive relief.

So the third of the four factors to consider is the balance of the equities. Essentially, the plaintiffs have argued that in balancing the equities, government officials are not harmed by the issuance of a preliminary injunction, which prevents the state from implementing a likely unconstitutional practice. The defendants have responded that the program is being supported by a philanthropic enterprise. And that there is no guarantee that the funding will be available indefinitely. And that it would -- stopping this program now would, perhaps, deprive the city of Baltimore of those philanthropic efforts. I'm aware of the arguments of both sides on balancing the equities. Does anyone want to add anything further on that?

MS. MOORE: Your Honor, this is Dana Moore -- I apologize.

THE COURT: Go ahead. Ms. Moore, go ahead.

MS. MOORE: So it's not just the funding issue, it's the funding issue coupled with the reality that violent crime continues in Baltimore. The public has a very --

THE COURT: I think we're going to get -- I think that's more of a public interest analysis. I hear you. I'm

going to get there in a minute. I just want to go over the matter of balancing the equities here. We're going to get into that discussion on public interest in a moment, the fourth of the four criteria.

Anything else you want to add on the balance of the equities and I'll hear from Ms. Gorski next.

MS. GORSKI: Nothing more, Your Honor. Thank you.

THE COURT: All right. Let's get into what Ms. Moore was about to get into and that's the public interest here. According to the papers here, and as I understand in the pleadings here, that this is one thing I'm afraid is rather distressing here in this difficult time that we're facing in terms of the pandemic, and the very fact that we're having this two-hour conference remotely, from different sites on the telephone, because of steps taken in terms of only having this court be open for emergency proceedings, consistent with the executive orders of Governor Hogan of our state, that according to my review of the papers as of eight days ago, April the 13th, there were 81 homicides in the city of Baltimore, which is five more than on April 13th, 2019. And 2019 was among -- I think it was the second most violent year in the history of the city.

And if one thing can be clear it's that the pandemic and the stay-at-home orders, it does not appear to have had any effect at all on the level of violence here in the city of

Baltimore. And the Court cannot ignore the important factor here of public interest with respect to the unfortunate situation here in the city of Baltimore, where even a pandemic cannot slow the pace of the killings in this city in certain neighborhoods.

Now, the plaintiffs have essentially noted, as a matter of public interest, that upholding constitutional rights clearly serves a public interest, without question. Clearly, no matter what the program is, if it's violative of constitutional rights, one does not satisfy their constitutional rights in the public interest of the overall majority of the public. But the defendants have argued that the public interest favors the Aerial Investigation Review Program, given this level of violence. For the entire year of 2019 there were 348 homicides in the city of Baltimore.

And I do not ignore the fact that that the United Baptist Ministry Convention, a leading religious organization here in this city, as well as the Greater Baltimore Committee, which is the -- essentially, the leading business advisory organization, both have been involved in this matter. They have both expressed their support for this program. And I certainly do not ignore the fact that consistent with the consent decree requirement, again, not getting the approval of this court in any way, but consistent with the consent decree that the Baltimore City Police Department has complied with

the consent decree in terms of providing notice of their intentions in this regard as well as public hearings.

Having said that, as I know the plaintiffs would likely note, having public hearings at this time is very difficult and clearly there could have perhaps been more public input if we weren't in the situation of essentially sheltering in place here during the pandemic. So the public interest is not something I'm going to lightly just ignore here. Clearly, the fundamental issue here before me is whether or not this constitutes a search, which would be violative of the Fourth Amendment.

But I'd be glad to hear from plaintiff's counsel on this and then I'll hear from defense counsel. I note that the plaintiff's counsel in its -- I mean, defense counsel in its submissions here on the public interest issue, essentially have contended that while the -- I think the exact language was while the plaintiffs purport to altruistically speak for all Baltimoreans, they do not represent the public citizenry at large. And the defense, the Police Department has noted the support of the United Baptist Ministry Convention, composed of some 100 churches, as well as the greater Baltimore Committee.

So, plaintiffs, I'll be glad to hear from you on this fourth of the four criteria in terms of the public interest, Mr. Kaufman or Ms. Gorski. And then I'll hear from

you Ms. Moore or Ms. Walden.

MS. GORSKI: Thank you, Your Honor. There are unquestionably many weighty considerations here. And plaintiffs acknowledge and underscore that reality. But as defendants have acknowledged, the injunctive relief analysis is not a popularity contest. And the public interest inquiry is not whether a raw majority of Baltimoreans favor wide-area surveillance or not. Ultimately, the BPD's objective here in reducing crime is commendable, but the public has, at bottom, an interest in vindicating its rights under the Fourth and First Amendments. And the BPD cannot pursue an unconstitutional policy in service of its commendable objective. Thank you.

THE COURT: All right. Thank you very much, Ms. Gorski.

And, Ms. Moore or Ms. Walden, I think Ms. Moore, you wanted to address this matter, go right ahead.

MS. MOORE: Sure, Your Honor. Your Honor laid out the factors neatly. Crime continues, violent crime continues in Baltimore. We would have expected it to go way down given the orders that we're all living under. And that has not happened. That has not happened. The community at large is crying out for solutions. They are expecting Commissioner Harrison and his police department and Mayor Young and his executive team to do something substantial to reduce crime.

We are getting that call at the time when we are seeing that it's very difficult to recruit police officers or new officers to the police department. It is very difficult to keep officers in the Baltimore City Police Department. And this is not just for us, this is happening across the country. All police departments are experiencing this.

We are concerned today about Baltimore. What are we going to do for Baltimore? And the community is giving us the answers. They want us to take new and different and constitutional solutions that will make this city safe. That's why the United Baptist Ministry Convention has said, and you're right, it's more than 100 churches that spoke out through a letter saying, please use this program. We had the community meetings. We went Facebook Live because we had to. We had to do that. And by going on Facebook live to talk about this program, we've been viewed by more than -- we've been more than 30,000 views.

Even before we started talking about this program, you will recall, Your Honor, that even before Commissioner Harrison was presented to the City Council for approval for consideration and approval as Baltimore City's new police commissioner, he did a complete tour of Baltimore City's many, many communities. And at those meetings all issues related to the police department were raised. And as he states in his -- in our papers, a number of people said we need the AIR

surveillance program. It was known at the time. And people were asking that this program not just be brought back, but be brought back quickly.

And it is unusual that a community, community leaders, the Greater Baltimore Committee, and Baltimore churches combine to voice support for any one thing. That's unusual. It is unusual for Governor Hogan, our governor to express support for programs in Baltimore that we believe will be effective. I believe that we have an unusual alignment of new stars that say use this program. Put it into effect. Try it. Let's see if it works. The time is now. That is really the overwhelming human cry out of Baltimore. That is the overwhelming, irrefutable public interest. It cannot be achieved by not permitting this program to go forward. And it is for this reason that we ask that the programs do go forward. Thank you.

THE COURT: All right. Thank you all very much. And, again, I have before me a motion for preliminary injunction here. And it's analyzed under Rule 65 of the Federal Rules of Civil Procedure. This form of injunctive relief is an extraordinary remedy to be exercised essentially very sparingly and in limited circumstances, as the 4th Circuit has held in cases that involves the very far reaching power here of this Court. And in determining whether or not the issue at preliminary injunction I follow the test set

forth in *Winter versus Natural Resources Defense Council* and the four factors that I have previously listed. And, essentially, the heavy burden on the plaintiffs is to make a clear showing of likelihood to succeed on the merits. And because preliminary injunction is an extraordinary remedy it may only be awarded on a clear showing that plaintiff is entitled to such relief. And such an injunction is not granted as a matter of course. And whether to grant such a preliminary injunction remains in the equitable discretion of this Court.

That's what's before me now. And I promise you all that I will get on this right away. I literally talked to counsel the day this thing was filed, the day this thing was filed, April the 9th. And I want to thank the lawyers for their high quality of briefing and the high quality of the arguments here. We've gone for over two hours and now the ball is in my court. And I will abide by that and I promise you that I will have a written opinion on this matter and file it by 5:00 o'clock this Friday, April the 24th.

Just so the record is clear, this doesn't -- I'm not determining the overall case now. I'm dealing with a question of preliminary injunctive relief at this time. And so with that, unless there's anything further from the point of view of the plaintiffs or the defendants, we will conclude this call.

Again, I want to thank the clerk's office here, Felicia Cannon and Catherine Stavlas, and their staff for coordinating this. I want to thank my law clerk, Anthony Vitti, being off site coordinating this call. And I want to our lead administrative court reporter Christine Asif for her work on this today. Again, we're all remotely off site here.

Is there anything further from the point of view of the plaintiffs before we call this to a conclusion?

MR. KAUFMAN: Nothing further, Your Honor.

MS. GORSKI: No, thank you.

THE COURT: Anything further from the point of view of the defendants?

MS. MOORE: Your Honor, I left out a very important constituency that is driving us to pursue this program, and that is the families who have suffered grievous losses and injuries to violent crime in Baltimore. They are crying for us to find a solution. And they are asking that we use this program. And I apologize for forgetting to include them.

THE COURT: That's all right. I'm sure they all realize that.

MS. MOORE: Thank you.

THE COURT: Okay. Thank you all very much. And with that, this will conclude the telephone conference today on this matter, leaders of a Beautiful Struggle versus Baltimore City Police Department, civil number RDB-20-0929.

Thank you all very much.

MS. GORSKI: Thank you, Your Honor.

MR. KAUFMAN: Thank you, Your Honor.

MS. MOORE: Thank you, Your Honor.

MS. WALDEN: Thank you, Your Honor.

(The proceedings were concluded.)

I, Christine Asif, RPR, FCRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

/s/
Christine T. Asif
Official Court Reporter